



1949

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## Recommended Citation

Whitney R. Harris, *Survey of the Federal Judicial Code - The 1948 Revision and First Interpretative Decisions*, 3 Sw L.J. 229 (1949)  
<https://scholar.smu.edu/smulr/vol3/iss3/1>

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## SURVEY OF THE FEDERAL JUDICIAL CODE

### THE 1948 REVISION AND FIRST INTERPRETATIVE DECISIONS

*Whitney R. Harris\**

THE steady improvement in the administration of justice in the federal courts, marked by the adoption of the Rules of Civil Procedure for the United States District Courts on September 1, 1938<sup>1</sup> and the Rules of Criminal Procedure for the United States District Courts on March 21, 1946,<sup>2</sup> has been further advanced by the enactment into positive law of Titles 18 and 28 of the United States Code, each effective September 1, 1948.<sup>3</sup> Numerous articles have been published concerning the changes effected in federal court practice and procedure by the new rules of civil and criminal procedure adopted for the district courts.<sup>4</sup> The purpose of this article will be to comment upon significant changes in substantive and adjective law accomplished by the revision and recodification of Title 28, "Judiciary and Judicial Procedure," of

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<sup>1</sup> Amendments to the Rules of Civil Procedure for the United States District Courts to conform to the revision of Title 28 were adopted by the Supreme Court on December 29, 1948.

<sup>2</sup> Amendments to the Rules of Criminal Procedure for the United States District Courts to conform to the revision of Titles 28 and 18 were adopted by the Supreme Court on December 27, 1948.

<sup>3</sup> Title 18 was enacted as Chapter 645—Public Law 772, Laws of the 80th Congress; Title 28 was enacted as Chapter 646—Public Law 773, Laws of the 80th Congress. The new codes constitute law, not merely *prima facie* law. It is unnecessary to refer to other statutes. Future changes will be framed as amendments to the codes rather than to prior statutes. See note 5 *infra*.

<sup>4</sup> See Miller, *The Federal Rules of Civil Procedure*, 13 TULANE L. REV. 99 (1938); Wheaton, *Federal Rules of Civil Procedure Interpreted*, 25 CORN. L. Q. 28 (1939); Potts, *New Rules of Criminal Procedure—A Suggestion*, 23 TEX. L. REV. 215 (1945); Orfield, *The Federal Rules of Criminal Procedure*, 33 CALIF. L. REV. 543 (1945); Deason, *The New Federal Rules of Criminal Procedure*, 55 YALE L. J. 694 (1946) and 56 YALE L. J. 197, (1947).

the United States Code,<sup>5</sup> in the light of the first decisions construing the code as so revised.

### ORGANIZATION OF THE COURTS

The revision provides that in each judicial district there shall be a district court known as the United States District Court for the district,<sup>6</sup> and that in each circuit there shall be a court of appeals known as the United States Court of Appeals for the circuit.<sup>7</sup> In each district having more than one judge the district judge senior in commission is denominated the chief judge of the district court,<sup>8</sup> and in each circuit the circuit judge senior in commission is denominated the chief judge of the circuit.<sup>9</sup>

The District of Columbia is now formally included as one of the eleven judicial circuits.<sup>10</sup> This designation is in line with numerous Acts of Congress<sup>11</sup> and previous decisions of the Supreme Court.<sup>12</sup> Alaska, the Canal Zone, and the Virgin Islands have been incorporated into the Ninth, Fifth, and Third judicial circuits, respectively.<sup>13</sup> Hawaii and Puerto Rico have been designated separate judicial districts.<sup>14</sup>

The annual October term of the Supreme Court is retained in

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<sup>5</sup> On May 24, 1949, by Chapter 139—Public Law 72, Laws of the 81st Congress, the revised Titles 18 and 28 were extensively amended for the purpose of correcting typographical and other minor errors, clarifying the language of some sections to conform more closely to the original law, and removing ambiguities discovered in the revisions of September 1, 1948.

<sup>6</sup> 28 U.S.C. § 132(a) (1948).

<sup>7</sup> 28 U.S.C. § 43(a) (1948) eliminates the word "circuit" from the former name of the court. 28 U.S.C. § 212 (1490).

<sup>8</sup> 28 U.S.C. § 136(a) (1948). Use of term "chief judge" in place of "senior district judge" is in recognition of increase in administrative duties of the office.

<sup>9</sup> 28 U.S.C. § 45(a) (1948). Use of term "chief judge" in place of "senior circuit judge" is in recognition of increase in administrative duties of the office.

<sup>10</sup> 28 U.S.C. § 41 (1948).

<sup>11</sup> See Acts of Congress listed in reviser's notes to Title 28, reported in UNITED STATES CODE CONGRESSIONAL SERVICE (1948).

<sup>12</sup> *Comm'r. v. Bedford's Estate*, 325 U. S. 283, 65 S. Ct. 1157, 89 L. Ed. 611 (1945); *Swift and Co. v. United States*, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587 (1928).

<sup>13</sup> 28 U.S.C. §§ 41 and 1294 (1948).

<sup>14</sup> 28 U.S.C. §§ 91 and 119 (1948).

the revision,<sup>15</sup> but hereafter the terms and sessions of other courts will be fixed by rule of court rather than by statute.<sup>16</sup>

### JURISDICTION OF THE SUPREME COURT

Under the Constitution, the Supreme Court has original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party.<sup>17</sup> The power resides in Congress to determine the extent to which such jurisdiction shall be exclusive.<sup>18</sup> Until the present revision Congress had not provided that the Supreme Court should have exclusive jurisdiction in civil cases between states.<sup>19</sup> The law now provides that the Supreme Court shall have original and exclusive jurisdiction of controversies between two or more states, and likewise of actions or proceedings *against* ambassadors or other public ministers of foreign states.<sup>20</sup>

The law formerly provided that the Supreme Court should have original jurisdiction of controversies *between* a state and citizens of other states or aliens.<sup>21</sup> This was partially in conflict with the 11th Amendment which prohibits an action in any federal court *against* a state by citizens of another state or aliens. The inconsistency has been eliminated in the revision which gives original but not exclusive jurisdiction to the Supreme Court of actions or proceedings *by* a state *against* the citizens of another state or against aliens.<sup>22</sup> Under the revision, the Supreme Court likewise has original but not exclusive jurisdiction of actions or proceedings brought *by* ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are

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<sup>15</sup> 28 U.S.C. § 2 (1948).

<sup>16</sup> 28 U.S.C. §§ 48 and 138 (1948).

<sup>17</sup> U. S. CONST., Art. III, § 2.

<sup>18</sup> *Ames v. Kansas*, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482 (1884).

<sup>19</sup> *Louisiana v. Texas*, 176 U. S. 1, 20 S. Ct. 251, 44 L. Ed. 347 (1900).

<sup>20</sup> 28 U.S.C. § 1251(a) (1948).

<sup>21</sup> 28 U.S.C. § 341 (1940).

<sup>22</sup> 28 U.S.C. § 1251(b) (1948).

parties, and of controversies between the United States and a state.<sup>23</sup>

No important changes have been made in the revision with respect to the appellate jurisdiction of the Supreme Court.

#### JURISDICTION OF THE COURTS OF APPEALS AND DISTRICT COURTS

The revision provides that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.<sup>24</sup> The original jurisdiction of the district courts remains basically the same under the revision.<sup>25</sup>

Article III of the Constitution extends the judicial power of the United States to cases and controversies "between citizens of different States."<sup>26</sup> By the Judiciary Act of 1789 Congress gave the inferior federal courts jurisdiction over cases "between a citizen of the State where the suit is brought, and a citizen of another State."<sup>27</sup> In *Hepburn and Dundas v. Ellzey*,<sup>28</sup> decided in 1804, the Supreme Court, speaking through Chief Justice Marshall, held that the District of Columbia could not be considered a state for jurisdictional purposes within the meaning of the Judiciary Act, and that the judicial power of the United States did not, therefore, extend to cases between citizens of the District of Columbia and citizens of states. This decision was law for the following 136 years, although from time to time criticism was made of the consequent inequities.<sup>29</sup>

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<sup>23</sup> *Ibid.*

<sup>24</sup> 28 U.S.C. § 1291 (1948).

<sup>25</sup> 28 U.S.C. §§ 1331 and 1332 (1948).

<sup>26</sup> U. S. CONST. Art. III, § 2, cl. 1.

<sup>27</sup> Act of Sept. 24, 1789, c. 20, 1 STAT. 73, 78, § 11.

<sup>28</sup> 6 U. S. 445, 2 L. Ed. 332 (1804).

<sup>29</sup> Thus in *Watson v. Brooks*, 13 Fed. 540 (C.C. D. Ore. 1882) the court, after stating that it was doubtful whether the same decision would now be made, said that "it is to be hoped it may yet be reviewed and overthrown."

In 1940 Congress attempted to remove the jurisdictional impediment to suits in the district courts between citizens of the District of Columbia and citizens of states,<sup>30</sup> and its intent to accomplish this end was clearly stated in the revision which defines the word "States" as used in the diversity section to include the Territories and the District of Columbia.<sup>31</sup> Such legislation gives rise to obvious constitutional difficulties, in view of the historic interpretation of Article III of the Constitution as setting the limits of judicial power which Congress may confer upon the constitutional courts.<sup>32</sup> To overcome these constitutional limitations either the word "States" as used in Article III would have to be construed as including the District of Columbia for jurisdictional purposes,<sup>33</sup> or some other source of power would have to be found in the Constitution enabling Congress to vest in the constitutional courts jurisdiction in excess of the limits of Article III.

The constitutionality of the 1940 amendment, which had been considered with conflicting results in the lower courts,<sup>34</sup> came under review of the Supreme Court in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, decided June 20, 1949.<sup>35</sup> The Court, in a five to four decision, upheld the constitutionality of the 1940 amendment, and inferentially the 1948 amendment, although the majority divided three to two on the basis for the decision. Two justices<sup>36</sup> would have overruled *Hepburn and Dundas v. Ellzey*; three justices,<sup>37</sup> without overruling that formidable precedent,

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<sup>30</sup> 28 U.S.C. § 41(1) was amended to give the district courts jurisdiction where a controversy is "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory."

<sup>31</sup> 28 U.S.C. § 1332(b) (1948).

<sup>32</sup> *Hodgson v. Bowerbank*, 9 U. S. 303, 3 L. Ed. 108 (1809).

<sup>33</sup> And overruling *Hepburn and Dundas v. Ellzey*, note 28 *supra*.

<sup>34</sup> Of twelve district courts that had considered the question prior to review by the Supreme Court, nine had held the enabling Act unconstitutional, and the two Courts of Appeals which had considered the matter had reached that conclusion. Only three district courts had held the enabling Act constitutional. See cases cited in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 69 S. Ct. 1173, 1174, note 4, (1949).

<sup>35</sup> \_\_\_\_\_ U. S. \_\_\_\_\_, 69 S. Ct. 1173, \_\_\_\_\_ L. Ed. \_\_\_\_\_ (1949).

<sup>36</sup> Justices Rutledge and Murphy.

<sup>37</sup> Justices Jackson, Black and Burton.

would have found the constitutional basis for the extension of jurisdiction in the power of Congress under Article I of the Constitution to exercise exclusive legislation over the District of Columbia.<sup>38</sup> Four justices,<sup>39</sup> would neither have overruled Marshall's decision nor have found any such power elsewhere in the Constitution. "And so," in the Shakespearian prose of Mr. Justice Frankfurter, "conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable."<sup>40</sup>

The law formerly denied jurisdiction to district courts over suits to recover upon promissory notes or other choses in action (other than foreign bills of exchange or corporate bearer paper) brought by an assignor unless such suit might have been prosecuted in the district court where filed if no assignment had been made.<sup>41</sup> This provision was known as the "assignee clause" and had been in force since the Judiciary Act of 1789.<sup>42</sup> The purpose of the assignee clause at the time of its enactment was said to have been "to prevent the conferring of jurisdiction on the Federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist."<sup>43</sup>

In 1875 a provision was added to the law to the effect that if it should appear to the satisfaction of a district court that any suit commenced therein or removed to that court from a state court did not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties to said suit had been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case within the jurisdiction of the district court, it should proceed no further therein,

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<sup>38</sup> U. S. CONST. Art. I, § 8, cl. 17.

<sup>39</sup> Chief Justice Vinson and Justice Douglas joined in one dissenting opinion; Justices Frankfurter and Reed joined in another dissenting opinion.

<sup>40</sup> 69 S. Ct. 1173, at 1200.

<sup>41</sup> 28 U.S.C. § 41(1) (1940).

<sup>42</sup> *New Orleans v. Quinlan*, 173 U. S. 191, 19 S. Ct. 329, 43 L. Ed. 664 (1899).

<sup>43</sup> *Sowell v. Federal Reserve Bank*, 268 U. S. 449, 453, 45 S. Ct. 528, 529, 69 L. Ed. 1041, 1048 (1925).

but should dismiss the suit or remand it to the court from which it was removed.<sup>44</sup> This broad language was held sufficient to reach improper or collusive assignments of choses in action, including foreign bills of exchange or corporate bearer paper which had been excepted from the assignee clause.<sup>45</sup>

In the revision, the assignee clause has been eliminated entirely. The law now provides simply that a district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke jurisdiction.<sup>46</sup> The former language authorizing the district court to dismiss an action not really and substantially involving a dispute or controversy within the jurisdiction of the court has been omitted as unnecessary, since the district court has the inherent power and duty to dismiss any case not within its jurisdiction, at the request of a party or upon its own motion.<sup>47</sup>

#### VENUE IN THE DISTRICT COURTS

A civil action in which jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all the plaintiffs or all the defendants reside; a civil action in which jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all the defendants reside, except as otherwise provided by law.<sup>48</sup>

Under the revision, a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district is regarded as the residence of such corporation for venue purposes.<sup>49</sup> In the absence of a comparable provision in the former law, the Supreme Court held that the designation by a foreign corporation, in con-

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<sup>44</sup> 28 U.S.C. § 80 (1940).

<sup>45</sup> *Bullard v. City of Cisco*, 290 U. S. 179, 54 S. Ct. 177, 78 L. Ed. 254 (1933).

<sup>46</sup> 28 U.S.C. § 1359 (1948).

<sup>47</sup> *Byers v. McAuley*, 149 U. S. 608, 13 S. Ct. 906, 37 L. Ed. 867 (1893).

<sup>48</sup> 28 U.S.C. § 1391(a) and (b) (1948).

<sup>49</sup> 28 U.S.C. § 1391(c) (1948).



formity with a valid statute of a state, of an agent upon whom service of process might be made as a condition of doing business within a state, was in effect a consent to be sued in the federal courts of that state.<sup>50</sup> The present venue provision extends that rule to cases in which a corporation is doing business in a state even though it has not designated an agent to receive service of process.

Prior to 1948 there was no general provision for change of venue between federal judicial districts.<sup>51</sup> The revision contains two such provisions, one relating to the doctrine of *forum non conveniens*, the other to transfer of cases erroneously filed.

The doctrine of *forum non conveniens* permits a court to dismiss an action that, from the standpoint of the convenience of parties and witnesses, might more appropriately and justly be tried in another court. It has been used in the federal courts subject to the limitation that where choice of forum is authorized by a special venue statute a discretion to dismiss will not be implied.<sup>52</sup>

In *United States v. National City Lines*,<sup>53</sup> decided at the 1947 term of court, the Supreme Court held the doctrine of *forum non conveniens* inapplicable to an action filed under the Clayton Act, which has special venue provisions, on the theory "that whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect."<sup>54</sup>

The Federal Employers' Liability Act contains a special venue section enabling the plaintiff to bring suit in the district of the residence of the defendant, or in which the cause of action arose, or

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<sup>50</sup> *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167 (1939).

<sup>51</sup> 28 U.S.C. §§ 119 and 163 (1940).

<sup>52</sup> *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); *Koster v. Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 67 S. Ct. 828, 91 L. Ed. 1067 (1947).

<sup>53</sup> 334 U. S. 573, 68 S. Ct. 1169, L. Ed. 1584 (1948).

<sup>54</sup> *Id.* at 596, 68 S. Ct. at 1181, 92 L. Ed. 1598.

in which the defendant shall be doing business at the time of commencing such action.<sup>55</sup> In *Baltimore & Ohio R. Co. v. Kepner*,<sup>56</sup> the Supreme Court held that this section gave the plaintiff such right to select venue as to preclude a state court from enjoining one of its own citizens from seeking relief in a federal court far removed from the place of the accident, even though the court recognized the inherent power of state courts to prevent a misuse of litigation by enjoining resort to vexatious and oppressive foreign suits.

The new section on *forum non conveniens* provides simply that, for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.<sup>57</sup> The question immediately arose, upon enactment of this section, whether the words "any civil action" were intended by Congress to broaden the scope of the doctrine as previously applied in the federal courts.<sup>58</sup>

On May 31, 1949, the Supreme Court handed down three opinions construing the new section, two arising under the Federal Employers' Liability Act, and one (the *National City Lines* case discussed above) arising under the Clayton Act.<sup>59</sup> The effect of the majority opinion in these cases is to make the doctrine of *forum non conveniens* applicable to cases arising under these two acts and, inferentially, to all other civil actions, irrespective of the venue provisions of any act under which they may arise.<sup>60</sup>

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<sup>55</sup> 45 U.S.C. § 56 (1948).

<sup>56</sup> 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28 (1941).

<sup>57</sup> 28 U.S.C. § 1404(a) (1948).

<sup>58</sup> In this connection see reviser's notes to 28 U.S.C. § 1404 (1948). H. R. REP. No. 308, 80th Cong., 1st Sess. (1947).

<sup>59</sup> *Ex parte Collett, Kilpatrick v. Texas & Pacific Railway Co., and United States v. National City Lines*, reported in 17 U. S. LAW WEEK 4453-4461 (1949).

<sup>60</sup> Mr. Justice Douglas, with whom Mr. Justice Black concurred, in dissenting from all three opinions, concluded that the effect of the majority decisions was to "make a basic change not only in the two statutes involved in these cases but in the Sherman Act, 15 U.S.C. §§ 4, 5, 15 U.S.C.A. §§ 4, 5; the Jones Act, 46 U.S.C. § 688, 46 U.S.C.A. § 688; the Suits in Admiralty Act, 46 U.S.C. § 782, 46 U.S.C.A. § 782; Merchants Act of 1936, 46 U.S.C. § 1128d, 46 U.S.C.A. § 1128d; the Securities Act, 15

The *National City Lines* case<sup>61</sup> came before the Supreme Court for the second time on a motion for leave to file a petition for certiorari to review the action of the District Court in applying the doctrine of *forum non conveniens* on remand<sup>62</sup> notwithstanding the contrary decision of the Supreme Court entered before enactment of the new section.<sup>63</sup> The court denied the motion, thereby sustaining the view of the District Court that, under the new section, the doctrine of *forum non conveniens* is applicable to actions arising under the Clayton Act.

In *Ex parte Collett*<sup>64</sup> and *Kilpatrick v. Texas and Pacific Railway Co.*,<sup>65</sup> the Court held that, under the new section, the doctrine of *forum non conveniens* was applicable to actions filed under the Federal Employers' Liability Act. In the *Collett* case petitioner, in October, 1942, had brought suit under that Act against the Louisville and Nashville Railroad in the United States District Court for the Eastern District of Illinois. No trial was had before September 1, 1948, the effective date of the revision. Thereafter the Railroad filed a motion to transfer the case to the District Court for the Eastern District of Kentucky, and the District Court, upon a well-supported finding that such transfer would serve the convenience of parties and witnesses and would be in the interest of justice, granted the motion. Petitioner then filed a motion in the Supreme Court for leave to file a petition for writ of mandamus and prohibition, contending that the order of transfer exceeded the authority of the District Court. The Court concluded that, in view of a direct reference to the *Baltimore & Ohio R. Co. v. Kep-*

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U.S.C. §§ 77a, 77v, 15 U.S.C.A. §§ 77a, 77v; the Securities Exchange Act, 15 U.S.C. §§ 78a, 78aa, 15 U.S.C.A. §§ 78a, 78aa; the Public Utility Holding Company Act, 15 U.S.C. §§ 79, 79y, 15 U.S.C.A. §§ 79, 79y; The Investment Company Act, 15 U.S.C. §§ 80a, 80a-43, 15 U.S.C.A. §§ 80a, 80a-43; and perhaps in other statutes too." *United States v. National City Lines*, \_\_\_\_\_ U. S. \_\_\_\_\_, 69 S. Ct. 955, 958, \_\_\_\_\_ L. Ed. \_\_\_\_\_ (1949).

<sup>61</sup> \_\_\_\_\_ U. S. \_\_\_\_\_, 69 S. Ct. 955, \_\_\_\_\_ L. Ed. \_\_\_\_\_ (1949).

<sup>62</sup> *United States v. National City Lines*, 80 F. Supp. 734 (S. D. Calif. 1948).

<sup>63</sup> See note 53 *supra*.

<sup>64</sup> \_\_\_\_\_ U. S. \_\_\_\_\_, 69 S. Ct. 944, \_\_\_\_\_ L. Ed. \_\_\_\_\_ (1949).

<sup>65</sup> \_\_\_\_\_ U. S. \_\_\_\_\_, 69 S. Ct. 953, \_\_\_\_\_ L. Ed. \_\_\_\_\_ (1949).

ner case<sup>66</sup> in the reviser's notes, Congress intended that the new section should be applied to cases arising under the Federal Employers' Liability Act, and, accordingly, denied the motion.

Where a case is filed in the wrong division or district from the standpoint of venue, it is no longer necessary for the court to dismiss the action. The law now provides that the district court of a district in which a case is filed laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.<sup>67</sup>

#### REMOVAL OF ACTIONS FROM STATE TO FEDERAL COURTS

The law formerly provided that when, in a suit filed in a state court, there was a controversy wholly between citizens of different states which could be fully determined as between them, either one or more of the defendants actually interested in such controversy could remove the suit into the district court of the United States.<sup>68</sup> The application of this language to specific cases gave rise to considerable confusion and resulted in an attempt by the courts to draw a distinction between separate and separable controversies. The Supreme Court held that if there was a separable controversy in the action, removal of that controversy necessitated removal of the whole case.<sup>69</sup> Lower federal courts held that if the controversy was so far distinct from any other controversy or controversies with which it was joined as to be "separate" rather than "separable," it did not come within the scope of the statute; and the application of the distinction so drawn resulted in wide divergencies as to whether, in such cases, any part or all of the action could be removed.<sup>70</sup>

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<sup>66</sup> See note 56 *supra*.

<sup>67</sup> 28 U.S.C. § 1406(a), as amended (1948). See note 5 *supra*.

<sup>68</sup> 28 U.S.C. § 71 (1940).

<sup>69</sup> *City of Gainesville v. Brown-Crummer Inv. Co.*, 277 U. S. 54, 48 S. Ct. 454, 72 L. Ed. 781 (1928).

<sup>70</sup> See notes in 41 HARV. L. REV. 1048 (1928) and 35 ILL. L. REV. 574 (1941).

The new statute eliminates the concept of separable controversy. It provides simply that whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed. The district court is then given power to determine all the issues in the case or, in its discretion, to remand all matters not otherwise within its original jurisdiction.<sup>71</sup>

The law no longer provides for the removal of controversies between citizens of different states upon the ground that prejudice or local influence will prevent the defendant from obtaining justice in that state court or other state court to which the action might have been removed for similar cause.<sup>72</sup>

Important changes have been made in the procedure for removal. Formerly the petition for removal could be filed in the state court any time before the defendant was required to answer or plead to the complaint.<sup>73</sup> Under the new procedure<sup>74</sup> the defendant desiring to remove any civil action or criminal prosecution from a state court must file a petition for removal in the appropriate district court.

The petition for removal of a criminal prosecution may be filed at any time before trial. The petition for removal of a civil action or proceeding must be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through

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<sup>71</sup> 28 U.S.C. § 1441 (1948).

<sup>72</sup> 28 U.S.C. § 71(d) (1940).

<sup>73</sup> 28 U.S.C. § 72 (1940); also note § 76.

<sup>74</sup> 28 U.S.C. § 1446, as amended (1948). See note 5 *supra*.

service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

The petition for removal must be verified. It need contain only a short and plain statement of the facts which entitle the defendant to removal, but must be accompanied by a copy of all process, pleadings and orders served upon him in the action, and by a bond<sup>76</sup> conditioned that the defendant will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Promptly after the filing of the petition and bond the defendant is required to give written notice thereof to all adverse parties and to file a copy of the petition with the clerk of the state court, which effects the removal. The state court may proceed no further with the case unless and until it is remanded.

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court may remand it to the state court by mailing a certified copy of the order of remand to the clerk of the state court. The state court may then proceed with the case and may order the payment of just costs.<sup>76</sup>

The law formerly provided that no appeal would lie from the decision of a district court remanding a cause to the state court from which it had been improperly removed.<sup>77</sup> Under this provision, it had been held that such order of remand *by the district court* could not be reviewed either in the circuit court of appeals or in the Supreme Court,<sup>78</sup> although in *Aetna Casualty Co. v. Flowers*,<sup>79</sup> decided in 1947, the Supreme Court granted certiorari

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<sup>76</sup> Except a petition for removal filed in behalf of the United States.

<sup>76</sup> 28 U.S.C. § 1447, as amended (1948). See note 5 *supra*.

<sup>77</sup> 28 U.S.C. § 71 (1940).

<sup>78</sup> *Kloeb v. Armour & Co.*, 311 U. S. 199, 61 S. Ct. 213, 85 L. Ed. 124 (1940); *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U. S. 563, 61 S. Ct. 715, 85 L. Ed. 1044 (1940); *U. S. v. Rice*, 327 U. S. 742, 66 S. Ct. 835, 90 L. Ed. 982 (1945).

<sup>79</sup> 330 U. S. 464, 67 S. Ct. 798, 91 L. Ed. 1024 (1947).

to review an order of remand which had been issued by the circuit court of appeals. The proviso that no appeal would lie from the decision of the district court remanding a cause to the state court from which it had been improperly removed was omitted from the revision and the question arose whether by reason of such omission it was the intention of Congress to permit appeals thereafter from such orders of remand. Any such question was dispelled by a new provision inserted in the code by the May, 1949 amendments thereto, to the effect that an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise.<sup>80</sup> This language is considerably broader than the former provision and would seem to be sufficient to prevent the Supreme Court from reviewing an order of remand issued by a court of appeals as well as by a district court and hence to change the rule of *Aetna Casualty Co. v. Flowers*.

#### ABSENCE OF QUORUM IN THE SUPREME COURT

The Supreme Court of the United States consists of a Chief Justice of the United States and eight associate justices, any six of whom constitute a quorum.<sup>81</sup> Absence of a quorum on a case coming to the Supreme Court from a court of appeals presents no serious problem since the parties have already had the benefit of one appeal. But where the law allows an appeal directly from the district court to the Supreme Court, lack of quorum in the Supreme Court has the effect of denying the parties any appellate review in a category of cases which, presumably, should have the most careful and prompt review.

The law formerly provided for limited relief in situations of this type where appeals were taken from district courts directly to the Supreme Court in anti-trust and interstate commerce cases.<sup>82</sup> In the revision, relief was sought to be made generally available

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<sup>80</sup> 28 U.S.C. § 1447(d), as amended (1948). See note 5 *supra*.

<sup>81</sup> 28 U.S.C. § 1 (1948).

<sup>82</sup> See 25 U.S.C. § 29 (1940) and 49 U.S.C. § 46 (1940), each as amended June 9, 1944, c. 239, 58 STAT. 272.

for cases in which a quorum was unavailable in a matter pending before the Supreme Court.<sup>83</sup>

The law now provides that if a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice may order the case remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as the order may direct, the decision of such court to be final and conclusive.<sup>84</sup>

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, the law now provides that if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.<sup>85</sup>

#### APPLICATIONS FOR WRITS OF HABEAS CORPUS

Writs of habeas corpus<sup>86</sup> may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge, within their respective jurisdictions.<sup>87</sup> It is desirable that, under ordinary circumstances, applications for the writ be addressed in the first instance to the district court having jurisdiction. The revision seeks to accomplish this by providing that the Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer

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<sup>83</sup> To the effect that absence of quorum is "extremely" unique, see statement of the Senate Committee on the Judiciary appearing at page 1136, U. S. CODE CONGRESSIONAL SERVICE (1944).

<sup>84</sup> 28 U.S.C. § 2109 (1948).

<sup>85</sup> *Ibid.*

<sup>86</sup> On this subject generally see the scholarly discussion of Chief Judge John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 FEDERAL RULES DECISIONS 171 (1948).

<sup>87</sup> 28 U.S.C. § 2241(a) (1948).



the application for hearing and determination to the district court having jurisdiction to entertain it.<sup>88</sup>

It has been observed that "petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief."<sup>89</sup> At the 1948 term of the Supreme Court, Mr. Justice Jackson discussed at some length the problem of the "perennial petitioner."<sup>90</sup> The law now provides that no circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any state, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.<sup>91</sup> The law still leaves open the problem of disposing of an application for writ of habeas corpus based upon new grounds which might, for aught that appears from the application, have been presented in a previous application.<sup>92</sup>

In *Ex parte Hawk*,<sup>93</sup> the Supreme Court laid down the rule that "ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted." The scope of the rule of the *Hawk* case was considerably narrowed by the decision of the Supreme Court in *Wade v. Mayo*,<sup>94</sup> decided

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<sup>88</sup> 28 U.S.C. § 2241(b) (1948).

<sup>89</sup> *Dorsey v. Gill*, 148 F (2d) 857, 862 (C. A. Dist. Col. 1945).

<sup>90</sup> *Price v. Johnston*, 334 U. S. 266, 68 S. Ct. 1049 (1948), (dissenting opinion).

<sup>91</sup> 28 U.S.C. § 2244 (1948).

<sup>92</sup> *Price v. Johnston*, 334 U. S. 266, 68 S. Ct. 1049 (1948).

<sup>93</sup> 321 U. S. 114, 116, 64 S. Ct. 448, 450, 88 L. Ed. 572, 574 (1944).

<sup>94</sup> 334 U. S. 672, 68 S. Ct. 1270 (1948).

at the 1948 term, in which it was held that a district court properly took jurisdiction of an application for writ of habeas corpus to review a conviction by a state court in spite of the failure of the accused to appeal from the original judgment of conviction or to seek writ of certiorari in the Supreme Court of the United States from the adverse decision of the highest state court on a petition for habeas corpus instituted in the state courts. The revision provides expressly that an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.<sup>95</sup> This language presumably will not change the rule of *Wade v. Mayo* because the court found, under the somewhat unusual circumstances of that case, that the accused had in point of fact substantially exhausted his state remedies.

At common law, in circumstances in which habeas corpus would not lie, the writ of error *coram nobis* might be issued by the trial court as a remedy for infringement of a constitutional right of the defendant in the course of a trial.<sup>96</sup> The equivalent of this ancient writ is now supplied by the provision that a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.<sup>97</sup> Of considerable importance is the further provision that an application for writ of habeas corpus in behalf

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<sup>95</sup> 28 U.S.C. § 2254 (1948).

<sup>96</sup> *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572 (1944).

<sup>97</sup> 28 U.S.C. § 2255 (1948), as amended. See note 5 *supra*.

of a prisoner who is authorized to apply for such relief may not be entertained "if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."<sup>98</sup>

#### INJUNCTIONS AND THREE-JUDGE DISTRICT COURTS

In *Toucey v. New York Life Insurance Co.*,<sup>99</sup> the Supreme Court, in a divided opinion, held that the federal courts are without power to enjoin the relitigation in state courts of cases and controversies previously fully adjudicated in the federal courts. The rule of this case appears to have been changed by the new provision that a court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.<sup>100</sup>

Applications for interlocutory or permanent injunctions must be heard by a district court of three judges when brought to restrain the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States, or of any state statute or order of an administrative board or commission acting under state statute for unconstitutionality of such statute.<sup>101</sup> The revision provides a uniform method for forming such courts.<sup>102</sup> The district judge to whom the application for injunction is presented constitutes one member of the court. On the filing of the application he immediately notifies the chief judge of the circuit who designates two other judges, at least one of whom must be a circuit judge. If the action involves the enforcement, operation or execution of a state statute or state adminis-

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<sup>98</sup> *Ibid.*

<sup>99</sup> 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100 (1941).

<sup>100</sup> 28 U.S.C. § 2283 (1948).

<sup>101</sup> 28 U.S.C. §§ 2281 and 2282 (1948).

<sup>102</sup> 28 U.S.C. § 2284 (1948).

trative order, at least five days notice of the hearing must be given to the governor and attorney general of the state; if the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days notice of the hearing must be given to the Attorney General of the United States and to the United States attorney for the district. In any case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage, which order will remain in force only until the hearing and determination by the full court. Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. But a single judge may not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment.

The Supreme Court has always been sensitive of the deference properly due state judicial action. In *Railroad Commission of Texas v. Pullman Company*<sup>103</sup> the Court held that, although a three-judge district court had jurisdiction and power to issue an injunction against the enforcement of an order of the Railroad Commission of the State of Texas requiring all sleeping cars to be in charge of Pullman conductors, on the ground that the order was not authorized by Texas law and was in violation of the 14th Amendment of the Constitution of the United States, the district court should withhold the exercise of its power so to do until the Texas courts had been given an opportunity to pass upon the question of the authority of the Commission under Texas law. This deference is to a lesser degree now made statutory by the requirement that a district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or re-

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<sup>103</sup> 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

strain the enforcement or execution of a state statute or order thereunder, whenever it appears that a state court of competent jurisdiction has itself stayed proceedings under such statute or order pending the determination in such state court of an action to enforce the same. If the action in the state court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the state.

#### JUDICIAL INTERPRETATION OF THE NEW CODE

The purpose of the 1948 revision of the judicial code was not to change, but to clarify and simplify the law.<sup>104</sup> Nevertheless changes were made, perhaps the most important of which have been discussed above; and, since the entire code has been enacted into positive law, a problem of interpretation inevitably will arise over many of the new and revised sections.

It is well-established that in a general revision of the law no changes will be found by the courts to have been made unless the language permits of no other construction "for it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed."<sup>105</sup> In construing the new judicial code the intention of Congress to change the effect of certain former laws may be found in the reviser's notes appended to the report of the Committee on the Judiciary to the House.<sup>106</sup> These notes discuss each section in

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<sup>104</sup> See for example statement of Representative Keogh, Chairman of the House Committee on the Revision of the Laws at the hearing before the House Judiciary Subcommittee: "The policy that we adopted . . . was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as substantive changes of law." Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. (1947). Senator Donnell, Chairman of the Senate Judiciary Subcommittee, considering the code, said on the floor that ". . . the purpose of this Bill is primarily to revise and codify and to enact into positive law with such corrections as were deemed by the committee to be of substantial and non-controversial nature." 94 CONG. REC. 7928 (1948).

<sup>105</sup> *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 199, 32 S. Ct. 626, 630, 56 L. Ed. 1047, 1053 (1912).

<sup>106</sup> H. R. REP. No. 308, 80th Cong., 1st Sess. (1947).

which a change was effected, giving the reasons therefor. In the first cases considered by it, in which construction of the revised code was involved, the Supreme Court has given considerable weight to the reviser's notes.<sup>107</sup> These notes, plus the many explanations of the language used in the revision in the long period of Congressional consideration thereof, will provide a helpful aid to the courts in properly construing and applying the new and revised sections of the code.

The thorough consideration given to the revision of the judicial code by Congress, aided as it was by eminent judges and members of the bar, and by private experts and consultants,<sup>108</sup> was recognized by the Supreme Court in *Ex parte Collett*, decided May 31, 1949.<sup>109</sup>

"This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code. And from the start, Congress obtained the most eminent expert assistance available. The spadework was entrusted to two lawbook-publishing firms, the staffs of which had unique experience in statutory codification and revision. They formed an advisory committee, including distinguished judges and members of the bar, and obtained the services of special consultants. Furthermore, an advisory committee was appointed by the Judicial Conference. And to assist with matters relating to the jurisdiction of this

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<sup>107</sup> The Supreme Court first considered the reviser's notes in *Stainback v. Mo Hock Ke Lock Po*, 336 U. S. 368, 376, note 12, 69 S. Ct. 606, 610, ..... L. Ed. .... (1949). See opinions in *Ex Parte Collett*, note 64 *supra*, and *United States v. National City Lines*, note 61 *supra*.

<sup>108</sup> The advisory committee consisted of Judge Floyd E. Thompson, former chief justice of the Illinois Supreme Court and former president of the Chicago Bar Association; Hon. Justin Miller, former associate justice of the United States Court of Appeals for the District of Columbia; Judge John B. Sanborn, judge of the United States Court of Appeals for the Eighth Circuit; Hon. Walter P. Armstrong of the Memphis bar, former president of the American Bar Association; and Hon. John Dickinson of the Philadelphia bar, former assistant Attorney General of the United States. The advisory committee was assisted by Judge John J. Parker, chief judge of the United States Court of Appeals for the Fourth Circuit, and by two special consultants: Judge Alexander Holtzoff, judge of the United States District Court for the District of Columbia, and Prof. James W. Moore of Yale University. H. R. REP. NO. 308, 80th Cong., 1st Sess. (1947).

<sup>109</sup> 69 S. Ct. 944, 949 (1949).

Court, Chief Justice Stone appointed an advisory committee, consisting of himself and Justice Frankfurter and Douglas.

"... We cannot blind ourselves to the hearings, to the experts, to the Committee reports, to the reviser's notes and their incorporation in the Committee reports—to a history of the most meticulous Congressional consideration."

#### SIGNIFICANCE OF THE NEW CODE

The 1948 revision to the judicial code is an important milestone in the improvement of the administration of justice in the courts of the United States. It is a remarkable demonstration of the effectiveness of an undertaking by Congress, in cooperation with public-spirited judges and members of the bar, aided by special consultants and private experts, to achieve progress in the field of judicial administration. This achievement points the way to similar undertakings by state legislatures, in cooperation with similar advisory bodies of judges and members of the bar, for the improvement of the administration of justice in state courts.

# SOUTHWESTERN LAW JOURNAL

Published quarterly by Southern Methodist University Law Students.

Subscription price \$4.00 per year, \$1.00 per single copy.

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